

Journal of Gender, Social Policy & the Law

Volume 11 | Issue 1

Article 6

2002

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Recommended Citation

Brown, Jennifer Gerarda. "Adjudication According to Codes of Judicial Conduct." American University Journal of Gender Social Policy and Law 11, no. 1 (2002): 67-83.

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ADJUDICATION ACCORDING TO CODES OF JUDICIAL CONDUCT

JENNIFER GERARDA BROWN*

INTRODUCTION

This symposium explores the problem of sexual orientation bias in the court system. My thesis is that we can find one solution to this problem in the codes of judicial conduct, the rules judges adopt to govern their own behavior. In many states, these codes already provide a framework to deter and punish judges who manifest sexual orientation bias.¹ Canon 3 of the American Bar Association Code of Judicial Conduct provides that “[a] judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice . . . based upon . . . sexual orientation.”² I have argued that judges manifest bias on the basis of sexual orientation and thereby violate Canon 3 when they engage in three kinds of behavior:

1. They use disrespectful words or phrases to refer to gay men, lesbians, and homosexuality in general;
2. They exhibit “positive bias” by finding facts in ways distorted by

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1. See, e.g., CAL. CODE OF JUD. ETHICS Canon 3(B) (5) (2000) (prohibiting a judge from manifesting bias or prejudice based upon sexual orientation); MISS. CODE OF JUD. CONDUCT Canon 3(B) (5) (2002) (requiring a judge to refrain from exhibiting sexual orientation bias in the performance of judicial duties).

2. See MODEL CODE OF JUD. CONDUCT Canon 3(B) (5) (2000) [hereinafter Canon 3]. Canon 3(B) (5), entitled “Adjudicative Responsibilities,” provides:

A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, and shall not permit staff, court officials and others subject to the judge’s direction and control to do so.

Id.; see also *id.* at cmt. (“A judge who manifests bias on any basis in a proceeding impairs the fairness of the proceeding and brings the judiciary into disrepute.”). Although Canon 3 is extensive and covers many aspects of adjudicative and administrative duties, this Article will use the phrase “Canon 3” to refer specifically to the anti-bias provision set forth above. *Id.*

assumptions or stereotypes about gays;

3. They exhibit “normative bias” in contexts where they have discretion in making or applying law by engaging in *de jure* disparate treatment on the basis of sexual orientation.³

Some would argue that bias includes only the first category — disrespect—and some small portion of the second—evidentiary error.⁴ I persist in my view, however, that a more capacious reading of Canon 3 is necessary to safeguard the integrity of the courts and protect litigants who have traditionally been marginalized by the system.

It is vitally important that we understand the reach of Canon 3 to include the process of adjudication and the substantive decisions of judges. Civility and respect are important, of course, but they are the very least that lesbian, gay, bisexual and transgender (“LGBT”) litigants should expect from the court system. If Canon 3 merely reminds judges of their manners, it is a very weak instrument indeed.

To ensure fairness and do justice, an anti-bias provision such as Canon 3 must go further. It must reach substantive decision-making—for that is where true injustice occurs. Contrary to the traditional children’s rhyme,⁵ words *can* hurt; no litigant should have to endure ridicule or humiliation as the price of justice. Furthermore, when the production site for the “sticks and stones” of litigation is adjudication, the LGBT litigant quickly realizes how lasting the damage from resulting bias can be. A polite, respectful judge can be biased on the basis of sexual orientation. That bias will be manifest not in courtroom demeanor, but in the heart of the judge’s work: ruling on evidence, making findings of fact, reading and applying precedent, and interpreting statutes. Shall we read Canon 3 to sit idly by while bias is manifest in these judicial actions?

Such a reading ignores the judiciary’s responsibility to ensure procedural and substantive fairness for the people who seek redress in the courts. When referring to the judge’s “duties,” Canon 3 discusses both “administrative” and “adjudicative” responsibilities.⁶ These are the duties that judges must perform “without bias or

3. Jennifer Gerarda Brown, *Sweeping Reform from Small Rules? Anti-bias Canons as a Substitute for Heightened Scrutiny*, 85 MINN. L. REV. 363, 370 (2000).

4. See William C. Duncan, *Sexual Orientation Bias: The Substantive Limits of Ethics Rules*, 11 AM. U. J. OF GENDER SOC. POL’Y & L. 85, 90-91 (2002) (counseling a very narrow reading of Canon 3).

5. For those who have not heard this rhyme in a while, here’s a reminder: “sticks and stones can break my bones but words will never hurt me.”

6. MODEL CODE OF JUD. CONDUCT Canon 3(B)-(C).

prejudice.”⁷ The very wording of Canon 3 militates against the argument that the anti-bias provision should function as little more than a rule of civility.⁸

Let me be clear, however. The reach of Canon 3 is not without structural or political limitation. Indeed, the Code of Judicial Conduct states that it “should be applied consistent with constitutional requirements, statutes, other court rules and decisional law and in the context of all relevant circumstances.”⁹ My argument has never been that Canon 3 can amend state or federal constitutions, overturn binding precedent, or justify a subversion of the legislative process. I have acknowledged that Canon 3 governs only the courts, and cannot reach the legislative or executive branches of government.¹⁰ Thus, a judge does not violate Canon 3 by ruling against LGBT litigants on the basis of sexual orientation when two conditions are met: (1) the ruling is compelled by superior law and (2) the superior law is also clearly anti-gay.¹¹ If applicable law—whether statute, regulation, or court case—is both *clearly anti-gay* and *binding*, a judge citing that law to rule against a gay or lesbian litigant should not fear discipline under Canon 3.

Consider, though, how many cases occur in which one or both of these conditions are not met. Judges sometimes rule on the basis of sexual orientation, citing law that is not binding upon them.¹² At other times, they rule against LGBT litigants on the basis of sexual orientation, citing law that is not clearly anti-gay.¹³ Judges cannot blame the law for the anti-gay results in these two categories of cases; the judges themselves must bear the responsibility. In some cases, vital moments arrive in which judges can choose whether or not they will use sexual orientation—just that characteristic, standing alone—to affect a litigant negatively. In these moments of choice, Canon 3 is activated to guide judges to a position of neutrality with respect to that characteristic.

7. MODEL CODE OF JUD. CONDUCT Canon 3(B) (5).

8. *See id.* (“A judge *shall* perform judicial duties without bias or prejudice.”) (emphasis added).

9. MODEL CODE OF JUD. CONDUCT pmbl.

10. *See generally id.* (establishing that the Code of Judicial Conduct sets standards for ethical conduct of judges).

11. *See Brown, supra* note 3, at 417.

12. *See id.* at 428-30 (indicating some judges misuse *stare decisis* as a form of judicial bias and subtle discrimination).

13. *See id.* at 419-28 (discussing that in most cases, judges reveal their biases by interjecting the issue of sexual orientation into statutes that have neutral standards).

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I. CANON 3 REQUIRES NEUTRALITY IN Demeanor, FACT-FINDING,
AND INTERPRETATION OF LAW

Neutrality requires judges to refrain from inflammatory rhetoric that is denigrating to gay litigants and their relationships. Using words or phrases like “homo,”¹⁴ “queer[],”¹⁵ “buggery,”¹⁶ “Sodom and Gomorrah,”¹⁷ or “sick situation”¹⁸ to describe LGBT litigants and their families clearly manifests bias on the basis of sexual orientation. Most people seem to agree that judges using such offensive language should be subject to discipline, but the proposition would not get unanimous approval.

In the spring of 2002, Lambda Legal Defense and Education Fund, Inc. and Equality Mississippi, two gay rights advocacy organizations, filed a grievance against Mississippi Judge Connie Glenn Wilkerson in response to a letter he wrote to the editor of the *George County Times*, published March 28, 2002.¹⁹ The letter stated that “gays and lesbians should be put in some type of a mental institute,” objected to legislation that advances civil rights for lesbian and gay people, and further stated that elected officials who support such legislation (as well as the citizens who vote for those officials) “have to stand in the judgment of GOD.”²⁰ Interestingly enough, only a week later, Mississippi amended its Code of Judicial Conduct to join the majority of states that specifically prohibit expressions of bias on the basis of

14. District Court Judge Oliver Gasch referred to a gay plaintiff as a “homo” and other gay men as “homos.” See *Steffan v. Cheney*, No. 88-3369 (OG), 1991 U.S. Dist. LEXIS 4852, at *10 (D.D.C. Apr. 12, 1991) (mem.), *aff’d on reh’g en banc sub nom. Steffan v. Perry*, 41 F.3d 677 (D.C. Cir. 1994).

15. See *In re Hampton*, 775 S.W.2d 629, 630 (Tex. 1989) (per curiam) (discussing a filing seeking removal of a judge who made comments such as, “I don’t care much for queers running around on the weekends picking up teenage boys,” as reported in the *Dallas Times Herald* on December 16, 1988).

16. See *Dale v. Boy Scouts of Am.*, 706 A.2d 270, 285 (N.J. 1998) (comparing the lower court’s analysis of “sodomy” and “buggery” with the Boy Scouts’ religious and moral foundation).

17. See, e.g., *id.* (discussing the trial judge’s description of the “Judeo-Christian tradition condemning sodomy” when the trial judge held that a homosexual scout leader would be adverse to the “morally straight” goals of the Boy Scouts of America).

18. See *Rucks v. State*, 692 So. 2d 976, 977 (Fla. Dist. Ct. App. 1997) (referring, apparently, to lesbian litigant’s household or relationship with another woman as a “sick situation”).

19. The full text of Judge Wilkerson’s letter to the editor is reprinted in the Complaint to the Mississippi Commission on Judicial Performance. See COMPLAINT TO THE MISSISSIPPI COMMISSION ON JUDICIAL PERFORMANCE AGAINST GEORGE COUNTY JUSTICE COURT JUDGE CONNIE GLENN WILKERSON 1-2 (Apr. 8, 2002) [hereinafter WILKERSON COMPLAINT], available at http://www.lambdalegal.org/binary-data/LAMBDA_PDF/pdf/128.pdf.

20. See *id.*

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sexual orientation.²¹ On April 9, 2002, only days after the Mississippi Supreme Court formally prohibited sexual orientation bias, Judge Wilkerson told an interviewer for Mississippi Public Radio that gay men and lesbians are “sick.”²²

In the winter of 2002, Alabama Supreme Court Chief Justice Roy Moore similarly gave vent to his feelings about homosexuality and managed, in a single concurring opinion, to exhibit all three kinds of sexual orientation bias: disrespect, positive bias, and normative bias. In this case, a California couple with three young children divorced in 1992, and the mother was awarded primary physical custody.²³ Four years later, the mother petitioned a California court for custody modification, asking that the father receive physical custody of the children, though he had moved to Alabama in the interim.²⁴ The reasons for this change are not entirely clear,²⁵ but the Alabama Supreme Court refers to the fact that change in custody occurred after the mother had begun a “homosexual relationship.”²⁶ At other points in the opinion, the mother is described as a recovering alcoholic,²⁷ which suggests that her alcoholism may have played a role in the custody change of 1996. In 1999, the mother filed again in California requesting that physical custody be returned to her.²⁸ The father resisted and the case was transferred to Alabama, where the three children resided.²⁹

In June of 2000, the Alabama trial court held a two-day hearing at which it heard oral testimony, including testimony by the two younger children, who were thirteen and fifteen years old at the

21. See *In the Matter of the Mississippi Code of Judicial Conduct*, Order (Apr. 4, 2002), available at <http://www.mssc.state.ms.us/news/sn94835.pdf>; see also MISS. CODE OF JUD. CONDUCT Canon 3(B)(5)-(6) (2002) (requiring both judges and lawyers to refrain from discriminatory language or conduct during judicial proceedings).

22. See WILKERSON COMPLAINT, *supra* note 19, at 4-5 (describing Judge Wilkerson's extrajudicial activities in public as demeaning).

23. See *Ex parte* H.H., No. 1002045, 2002 Ala. LEXIS 44, at *1 (Feb. 15, 2002).

24. *Id.* at *1-*2.

25. The mother, Dawn Huber, has since told reporters that she petitioned for the change in custody at the request of her children, who were twelve, eleven and nine years old at the time. See Leon Drouin Keith, *Lesbian Mother in Alabama Custody Case Mulls Appeal*, ASSOC. PRESS, Mar. 28, 2002, available at <http://www.sodomylaws.org/usa/alabama/alnews20.htm>.

26. *Ex parte* H.H., 2002 Ala. LEXIS 44, at *1-*2.

27. According to the trial court, the father argued that the mother was “an alcoholic lesbian.” *Id.* at *6. The court of appeals noted that the mother “was now sober.” *Id.* at *8.

28. See *id.* at *2; see also Keith, *supra* note 25 (relating that the petition for change of custody was at the request of the children, according to the mother).

29. See *Ex parte* H.H., 2002 Ala. LEXIS 44, at *2.

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time.³⁰ The trial court developed a record filled with information about modes of punishment used by the father,³¹ the children's performance in school,³² attempts by the father to limit or monitor the children's communication with their mother,³³ worries about the eldest child's sexual activity and health care,³⁴ and the children's feelings about their father and stepmother.³⁵

Though the record from this hearing was presumably voluminous, the trial court's written findings of fact, as summarized by the Alabama Supreme Court, were sparse.³⁶ The trial court paraphrased each parent's accusations about the other (mother: the father is "a domestic abuser"; father: the mother is an "alcoholic lesbian") and stated that "it can be no surprise that these children have serious issues in their lives."³⁷ The trial court denied the mother's petition for a change in custody, finding that the mother had failed to prove a material change in circumstances or otherwise show that "the change in custody will materially promote the child's best interests, and that the benefits of the change will offset the disruptive effect caused by uprooting the child."³⁸

The Alabama Court of Civil Appeals reversed, holding that the mother had presented substantial evidence that "a change in custody would materially promote the children's best interest and welfare."³⁹ The father sought certiorari review in the Alabama Supreme Court.⁴⁰

The Alabama Supreme Court reversed the court of appeals and

30. *See id.*

31. *See id.* at *3-*4 (including such violent acts as slapping, whipping, kicking, and requiring the sons to sit with paper bags on their heads as punishment).

32. *See id.* at *4 (explaining the mother's claims that the children's grades had dropped since the children started living with their father).

33. *See id.* at *4-*5 ("[F]ather was denying the children the ability to contact [their mother] by tape-recording their telephone calls to the mother and preventing them from using E-mail . . .").

34. *See id.* at *5 (indicating first the mother's fears that the sexually active daughter had not been to a gynecologist and second, that the daughter had denied she was sexually active when apparently confronted by the father).

35. *See id.* (highlighting testimony from two of the children, one stating that the father was "too strict" and the other stating that the stepmother had "taken over" the child's computer).

36. *See id.* at *6-*7.

37. *Id.* at *6.

38. *Id.* (citing *Ex parte McLendon*, 455 So. 2d 863, 865 (Ala. 1984) (holding that a party seeking a custody modification must show that the change in custody would promote the child's best interest and that the benefits of the change justify any disruptive effect)).

39. *Id.* at *7.

40. *See id.* at *8.

reinstated the order of the trial court.⁴¹ Given the media attention focused on this case and the inflammatory language of Justice Roy Moore's concurring opinion, it is important to focus with some precision on what the *majority* of the Alabama Supreme Court did or did not say in its opinion. Whatever Chief Justice Moore⁴² or the Associated Press⁴³ may suggest, it is important to note that *nowhere* in the majority opinion does the author, Justice Houston, argue that the trial court was entitled to reject the mother's bid for testimony based solely on her sexual orientation.

Indeed, Justice Houston seems to reject the opportunity to discuss homosexuality in any significant way. The majority opinion contains exactly five references to the mother's lesbianism: three of these appear in the summary of the trial court's findings⁴⁴ and one appears in the summary of the appellate court's ruling.⁴⁵ Only once does the majority opinion independently refer to the mother's sexual orientation; this occurs near the beginning of the opinion as Justice Houston sets forth the factual and procedural chronology of the case:

41. See *id.* at *7.

42. See *id.* at *16 (Moore, C.J., concurring). Moore inaccurately states that the majority opinion is "upholding the trial court's *ore tenus* finding and Alabama precedent, which holds that homosexual conduct by a parent is inherently detrimental to children." *Id.* While it is true that the majority upholds the *ore tenus* finding below, the majority never endorses the Alabama precedent to which Chief Justice Moore refers.

43. See Phillip Rawls, *Judge Calls Homosexuality 'Evil' in Alabama Court Decision*, ASSOC. PRESS, Feb. 15, 2002 (suggesting inaccurately that Moore's anti-gay language appears in the "unanimous" decision by the court), available at <http://www.agrnews.org/issues/162/nationalnews.html>; *Chief Justice Roy Moore Speaks Out on Gays*, ASSOC. PRESS, Mar. 24, 2002 (on file with *American University Journal of Gender, Social Policy & the Law*) ("Moore described homosexuality as 'abhorrent, immoral, detestable' in a unanimous Alabama Supreme Court ruling last month denying a lesbian mother custody of her three children"). It is interesting to speculate about why reporters would enhance the anti-gay image of *Ex parte H.H.* Perhaps, as one colleague of mine suggested, this is yet another example of the "liberal media fanning the flames of the culture wars." If so, I fear that the strategy can backfire. It is easy to overestimate the breadth and intensity of hostility toward LGBT people, and presenting *Ex parte H.H.* as a unanimously anti-gay opinion facilitates such views. If the emphasis were instead put on the neutrality of the majority opinion, even in the face of Moore's anti-gay screed, a saner sort of discourse might emerge. And the millions of Americans who find themselves in the persuadable middle of this particular culture war could take from the majority's neutrality an example for more progressive behavior.

44. See *Ex parte H.H.*, 2002 Ala. LEXIS 44, at *4-*6. The majority quotes the following trial court findings referencing the mother's lesbianism: (1) "The record indicates that . . . all the children's grades fell after the mother started her homosexual relationship," *id.* at *4; (2) "The [father] says the [mother] is an alcoholic lesbian," *id.* at *6; and (3) "while not . . . condoning the [mother's] lifestyle, this Court cannot rewrite the lives of the parties or [the] children." *Id.*

45. See *id.* at *8 ("The Court of Civil Appeals also held that . . . there was no evidence indicating her homosexual relationship would have a detrimental effect on the well-being of the children.").

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"In 1996, after the mother had begun a homosexual relationship, she petitioned a California court for a custody modification, asking that the father . . . be awarded physical custody of the children."⁴⁶

The majority's reasoning—that is, the stated basis for its decision to reverse the court of appeals and reinstate the order of the trial court—focuses entirely upon a procedural point.⁴⁷ The majority opinion stands for the rather unremarkable proposition that an appellate court should not reweigh oral testimony, because the trial judge (who, after all, is the one who actually saw the witnesses and heard their testimony) is in the better position to assess it.⁴⁸ The *result* of *Ex parte H.H.* is certainly regrettable; a lesbian mother has failed to regain custody of her children because she was unable to persuade a court that circumstances merited the change.⁴⁹ The *holding* of *Ex parte H.H.*, on the other hand, is less troubling. From the perspective of those of us who wish to eliminate sexual orientation bias in the courts, the majority opinion in *Ex parte H.H.* might even be a cause for mild celebration.

Celebrating the *Ex parte H.H.* case may strike some readers as weirdly Pollyanna-esque,⁵⁰ but consider the context. The context is Alabama, where consensual sex between people of the same sex remains a criminal act,⁵¹ where the state legislature has adopted an anti-marriage statute⁵² denying recognition to marriages celebrated in

46. *Id.* at *1-*2.

47. *See id.* at *11 (reversing the appellate court's holding that the trial court's judgment was unsupported by the evidence).

48. *See id.* at *10 ("We hold that the Court of Civil Appeals impermissibly reweighed the evidence in this case.").

49. *See id.* at *6 (citing *Ex parte McLendon* in noting that the mother had failed to prove material change in circumstances such that the "benefits of the change in custody [would] offset the disruptive effect caused by uprooting" the children).

50. Some might protest that I'm not just seeing a glass half full rather than half empty. I am, as the old joke goes, responding to a gift of manure by asking "Great! Where's my pony?"

51. ALA. CODE § 13A-6-65 (1975).

52. In the wake of the Hawaii Supreme Court's opinion in *Baehr v. Lewin*, 852 P.2d 44, 68 (Haw. 1993) (ruling that the state's marriage laws discriminate on the basis of gender and must be justified by a compelling state interest), *reh'g granted in part*, 875 P.2d 225 (Haw. 1993), *aff'd sub nom.* *Baehr v. Miike*, 950 P.2d 1234 (Haw. 1997), people in other parts of the country feared that Hawaii would begin to marry couples of the same sex and "export" those marriages to other states. *See* Grant S. Nelson & Robert J. Pushaw, Jr., *Rethinking the Commerce Clause: Applying First Principles to Uphold Federal Commercial Regulations but Preserve State Control Over Social Issues*, 85 IOWA L. REV. 1, 170 (1999) (noting that as a result of the Hawaii Supreme Court's holding in *Baehr*, Congress enacted the Defense of Marriage Act ("DOMA"), which stated that no state is required to recognize any same-sex marriage legalized in another state). To forestall the anticipated spread of same-sex marriage, many states enacted "mini-DOMAs," declaring that they would not recognize any marriage celebrated between people of the same sex. *See, e.g.*, GA. CODE ANN. § 19-3-3.1 (1996)

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other states between people of the same sex,⁵³ where as recently as 1998 the state supreme court declared that homosexuality is “illegal under the laws of this state and immoral in the eyes of most of its citizens,”⁵⁴ and where (let us not forget) the Canons of Judicial Ethics prohibit bias or prejudice but do not specifically mention sexual orientation bias.⁵⁵ In this context, in a custody dispute involving a lesbian mother, the state supreme court majority opinion purports to rule on purely procedural grounds.⁵⁶ This strikes me as progress. To put this point more concretely, imagine future opponents of LGBT litigants sifting through Alabama court opinions in search of cases hostile to homosexuality and/or LGBT parents. They go directly to *Ex parte H.H.*, having heard that its holding and reasoning will support their cause. They will be disappointed, because they will find that Chief Justice Moore wrote alone, and an honest reading of the majority opinion will reveal that it stands only for an unremarkable point of appellate procedure.⁵⁷ Perhaps this is why Chief Justice

(recognizing unions between men and women only); S.C. CODE ANN. § 20-1-15 (Law. Co-op 1996) (declaring same-sex marriages against state policy). The state and federal constitutionality of such anti-marriage statutes has been—and likely will continue to be—vigorously contested. See, e.g., Andrew Koppelman, *Same-Sex Marriage, Choice of Law, and Public Policy*, 76 TEX. L. REV. 921 (1998); Melissa Rothstein, *The Defense of Marriage Act and Federalism: A States' Rights Argument in Defense of Same-Sex Marriages*, 31 FAM. L.Q. 571 (1997); Scott Ruskay-Kidd, Note, *The Defense of Marriage Act and the Overextension of Congressional Authority*, 97 COLUM. L. REV. 1435 (1997). For commentary opposing same-sex marriages, see generally for example, Jeffrey L. Rensberger, *Same-Sex Marriages and the Defense of Marriage Act: A Deviant View of an Experiment in Full Faith and Credit*, 32 CREIGHTON L. REV. 409 (1998); Lynn Wardle, *Williams v. North Carolina, Divorce Recognition, and Same-Sex Marriage Recognition*, 32 CREIGHTON L. REV. 187 (1998); Ralph U. Whitten, *The Original Understanding of the Full Faith and Credit Clause and the Defense of Marriage Act*, 32 CREIGHTON L. REV. 255 (1998).

53. See ALA. CODE § 30-1-19 (1975).

54. See *Ex parte D.W.W.*, 717 So. 2d 793, 796 (Ala. 1998) (reviewing a very restrictive visitation arrangement imposed upon a lesbian mother by Judge Roy Moore, Circuit Court, Etowah County). Interestingly, only one Alabama Supreme Court justice signed onto this opinion. See *id.* Two justices (including Justice Houston, the author of the *Ex parte H.H.* majority opinion) concurred in the result and two dissented. See *id.*; see also *Ex parte J.M.F.*, 730 So. 2d 1190, 1196 (Ala. 1998) (quoting *Ex parte D.W.W.* to support denial of custody to lesbian mother on the basis of her sexual orientation). These cases are rich with examples of judicial bias on the basis of sexual orientation. For a fuller analysis, see Elizabeth Erin Bosquet, *Contextualizing and Analyzing Alabama's Approach to Gay and Lesbian Custody Rights*, 51 ALA. L. REV. 1625 (2000).

55. Canon 3 of the Alabama Canons of Judicial Ethics forbids “personal bias or prejudice concerning a party,” but specific characteristics such as sexual orientation are not enumerated. See ALA. CANONS OF JUD. ETHICS 3(c)(1)(a) (1999).

56. See *Ex parte H.H.*, No. 1002045, 2002 Ala. LEXIS 44, at *10-*11 (Feb. 15, 2002) (refusing to affirm the Court of Civil Appeals opinion for “impermissibly” reweighing evidence).

57. For example, West “Keynotes”™ for the majority opinion do not even mention homosexuality. See generally *Ex parte H.H.*, 2002 WL 227956 (Ala. Feb. 15,

Moore felt so strongly compelled to write his opinion.

As William Duncan suggests in this symposium, Chief Justice Moore may accurately describe the Alabama courts' historical hostility to homosexuality.⁵⁸ But Chief Justice Moore describes another aspect of Alabama law that is crucial here; he writes that "it is within a trial court's *discretion* to determine that the homosexual conduct and relationship of a parent . . . is detrimental to the children."⁵⁹ Chief Justice Moore himself makes clear that a judge's decision regarding a parent's sexual orientation is a discretionary one; nothing in Alabama law, hostile though it may be, *requires* a judge in a custody case to consider or condemn a parent's homosexuality.⁶⁰ Thus, moments of choice arrive at trial (when the judge originally exercises discretion) and on appeal (as judges review that exercise of discretion). These judges choose whether or not a litigant's sexual orientation will be treated as a neutral factor or, in contrast, as an opportunity to deliver page upon page of inflammatory screed against homosexuality.

The majority and concurring opinions in *Ex parte H.H.* illustrate this contrast. The majority's holding rests upon an unremarkable principle of appellate procedure.⁶¹ Granted, the mother's homosexuality was a fact presented to and considered by the trial court, and the Alabama Supreme Court declined to disentangle that record in an effort to ensure that she was *not* penalized for her sexual orientation. True, the court did not explicitly repudiate Chief Justice Moore's summary of Alabama law or in any way condemn his inflammatory rhetoric. From my perspective, certainly, the majority opinion in *Ex parte H.H.* could be better.

But then again, it could have been much worse. Chief Justice Moore demonstrates this as he consumes thirty-five pages to explain why, in his view, homosexuality is "detestable," an "abominable sin," "abhorrent," "immoral," "an inherent evil," and "inherently destructive to the natural order of society."⁶² Although Chief Justice

2002).

58. See Duncan, *supra* note 4, at 97.

59. *Ex parte H.H.*, 2002 Ala. LEXIS 44, at *16-*17 (Moore, C.J., concurring) (emphasis added).

60. See Brown, *supra* note 3, at 424 (noting that discretionary standards such as "the best interest of the child" give judges a choice and arguing that "[i]f a judge need not rule against a litigant on the basis of sexual orientation, then Canon 3 demands that judges rule on this basis only when they are certain that the ruling does not stem from bias.").

61. See *Ex parte H.H.*, 2002 Ala. LEXIS 44, at *10-*11 (focusing on whether the Court of Civil Appeals impermissibly reweighed the evidence submitted at trial).

62. *Id.* at *45 (Moore, C.J., concurring).

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Moore describes “homosexual behavior” as “an act so heinous that it defies one’s ability to describe it,”⁶³ his thirty-plus page opinion suggests that he was not unduly daunted by this challenge. The rhetoric fairly sputters with hostility and moral indignation toward behavior that is constitutive of a litigant’s identity as a lesbian.⁶⁴ In the face of such patent animosity, calling this language “disrespectful” seems a ridiculous understatement.

In a passing flash of good sense, Chief Justice Moore argues that “judges should not make decisions based on the latest psychological or sociological study or statistical poll, the interpretations of which are subject to the bias and philosophical leanings of the researchers and which are subject to being refuted by other studies.”⁶⁵ I am inclined to agree with Chief Justice Moore’s skepticism about the usefulness of social scientific data about homosexuality, but my answer is to focus on the evidence regarding the individual LGBT litigants before the court,⁶⁶ rather than to fall back on what Moore calls “fixed principles.”⁶⁷ He disregards his own sage advice about social scientific data, moreover, when he drops a page-long footnote (complete with explanatory parentheticals) citing several studies that find a greater incidence of emotional and psychiatric disorders among LGBT populations.⁶⁸ If social scientific studies are suspect, one might ask the point of reproducing such findings in a judicial opinion. It seems Chief Justice Moore cannot resist the opportunity to cite studies he deems consistent with his view of homosexuality as pathology. This is positive bias, for it reflects a distortion in the way Chief Justice Moore perceives and describes the litigants in the case

63. *Id.* at *43 (Moore, C.J., concurring).

64. See Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 865 (2002) (“The shift from burdening homosexual status to burdening homosexual sodomy is not much of a shift because sodomy is at least partially constitutive of gay identity.”).

65. *Ex parte* H.H., 2002 Ala. LEXIS 44, at *39-40 (Moore, C.J., concurring) (citations omitted).

66. Brown, *supra* note 3, at 411 (“[W]hen clear and reliable evidence specific to a gay or lesbian litigant exists in a case, it should never be trumped by group statistics.”).

67. *Ex parte* H.H., 2002 Ala. LEXIS 44, at *39-40 (Moore, C.J., concurring) (contending that judges should not make decisions based on psychological or sociological studies which can be subject to bias or later refuted through additional studies).

68. Moore notes the argument that societal condemnation causes this higher incidence of mental illness rather than something inherent in homosexuality, but he says it is “contradicted” by a study showing a higher incidence of mental health problems among LGBT people in the Netherlands. See *id.* at *42. He assumes that because recent Dutch law has been particularly progressive on gay rights, LGBT people in the Netherlands do not suffer—indeed, have never suffered—discrimination or societal condemnation on the basis of sexual orientation. *Id.* This assumption is far fetched.

before him.

If a judicial opinion—even one as inflammatory as Chief Justice Moore’s—were compelled by statute, regulation, or binding precedent, it would be insulated from discipline. As Chief Justice Moore himself acknowledges, however, considering a parent’s sexual orientation in custody disputes is within a judge’s discretion; it is not mandatory. Even if it were mandatory, nothing in the law would require the many pages of hostility Chief Justice Moore chose to pour forth. The issue in the case was a procedural one: was the evidentiary basis for the trial court’s ruling sufficient, and was the appellate court wrong to reweigh that evidence, especially the oral testimony?⁶⁹ Chief Justice Moore apparently agreed with the majority’s opinion on this controlling, procedural issue.⁷⁰ The decision to spend thirty pages *in this case* decrying homosexuality was driven by Chief Justice Moore’s obvious hostility to homosexuality, not by Alabama law. To the extent Chief Justice Moore focused on the issue at hand, the standard of appellate review, his opinion duplicated the majority’s.⁷¹ To the extent he went beyond that procedural issue, his opinion was gratuitous and beside the point.⁷²

In defense of his opinion, Chief Justice Moore has argued that “a person is never biased by abiding by the law,” and “the law in Alabama says that sodomy is against the law.”⁷³ When a judge “abides by” law that is not relevant to or binding upon the issue at hand, however, bias can seep into the proceedings, particularly when the judge is abiding by non-binding law that systematically disadvantages a discrete group of litigants.

II. CANON 3 DOES NOT REQUIRE FAVORING LGBT LITIGANTS ON THE BASIS OF SEXUAL ORIENTATION

In his essay for this symposium, William Duncan acknowledges that the reach of Canon 3 probably requires more than civility from judges, extending perhaps as far as judges’ fact finding and evidentiary rulings.⁷⁴ He takes issue with my insistence that judges

69. *Id.* at *1.

70. *Id.* at *16 (Moore, C.J., concurring).

71. *Id.*

72. Even the lawyer for the father in the case acknowledged after the ruling that Moore’s concurring opinion did not reflect the views of the majority of the court and was “not the central issue in this case.” Keith, *supra* note 25.

73. *Chief Justice Roy Moore Speaks Out on Gays*, ASSOC. PRESS, Mar. 24, 2002 (on file with the *American University Journal of Gender, Social Policy & the Law*).

74. See Duncan, *supra* note 4, at 90-92.

can manifest bias and violate Canon 3 when they interpret and apply the law.⁷⁵ He argues that we go too far if we attempt to subject normative bias to discipline.⁷⁶ The mode of argument he employs is fascinating, but ultimately misleading.

In an effort to explore the continuum along which types of bias might lie, he suggests two categories of behavior that he believes might legitimately be prohibited by Canon 3: “name calling” and “irrelevant notice of sexual orientation.”⁷⁷ To discuss whether the reach of Canon 3 might extend beyond these behaviors, Mr. Duncan considers two normative standards that might be intended by Canon 3: “preference for homosexual litigants”⁷⁸ and “bias provision as constitutional standard.”⁷⁹ First, I find it interesting that Mr. Duncan places upon his “continuum” four elements that are not really parallel. Within the reach of Canon 3 he endorses, Mr. Duncan is able to describe judicial behavior that would run afoul of Canon 3 and be subject to discipline.⁸⁰ For the points on the so called continuum that lie outside his approved reach of Canon 3, on the other hand, he chooses not to describe judicial behavior that would run afoul of the standard.⁸¹

Second, I am aware of no court or commentator advocating “preference for homosexual litigants” as the standard for avoiding imputations of bias or prejudice under Canon 3. In my earlier work on Canon 3, I consistently argued that avoiding sexual orientation bias requires judges to be “orientation neutral,” treating homosexuality and heterosexuality as legally and morally equal.⁸² Mr. Duncan and I might have honest disagreements about what is required for a judge to be orientation neutral; treatment I would perceive as “fair” to an LGBT litigant might seem preferential to Mr.

75. *See id.* at 92-94.

76. *See id.*

77. *Id.* at 90-92.

78. *Id.* at 92-93.

79. *See id.* at 93.

80. *See id.* at 90-92.

81. This lack of parallelism is what I sought to avoid when I described the reach of Canon 3 consistently in terms of judicial behavior that would run afoul of it. Brown, *supra* note 3, at 370.

82. *See id.* at 392 (“Perhaps it would be helpful for judges to adopt the same approach they take to heterosexual litigants: most judges can accept that a straight person might be sexually active without allowing the person’s sexuality to overshadow all other aspects of his or her identity”); *see also id.* at 426 (“Canon 3 merely requires that when judges apply discretionary standards, the factors they consider should be orientation-neutral—equally applicable to heterosexual and homosexual parents.”).

Duncan, especially if the court upheld an LGBT litigant's rights at the expense of a heterosexual person. For example, treatment I would characterize as "fair" to a lesbian mother in a custody dispute might cause her heterosexual ex-spouse to get less time with their children. Because the husband has something to lose if we start to dismantle the heterosexual privilege that gives him certain advantages,⁸³ it is tempting to let those potential losses loom larger than the corresponding potential gain to the mother, who currently suffers sexual orientation bias. This is only to say that "fairness" and "partiality" are often in the eye of the beholder.

The closest I have come to advocating an approach that gives LGBT litigants treatment different from heterosexual litigants relates to laws that have a disparate impact on LGBT litigants. For example, judges in custody disputes might use marriage as a factor which, on its face, appears orientation-neutral, arguing that they are seeking to protect children not from homosexuality per se but rather from extramarital sex. Because people are not permitted to marry members of their own sex, however, this factor would clearly disadvantage gay people. Thus, in a custody case, a judge could rule against a gay man in a committed, long-term relationship with another man, granting the man's ex-wife greater access to the children because she has taken the opportunity to marry a new male partner. When a factor such as the opportunity to commit to a relationship through marriage has so clear a disparate impact, judges might exercise some care about using this factor to the detriment of gay and lesbian litigants.⁸⁴ Again, it is important that we are contemplating judicial decision-making under broadly discretionary standards. If a judge is not required to use a factor like marriage, the judge might avoid doing so in ways that would predictably disadvantage LGBT litigants, focusing instead on factors that are more truly orientation neutral.

Even this caveat falls far short of advocating a "preference for homosexual litigants." Since no one appears to be advocating such a

83. As Professor Bruce Ryder argues, "What heterosexism gives straight men and women, what it takes away from lesbians and gays, is heterosexual privilege." Bruce Ryder, *Straight Talk: Male Heterosexual Privilege*, 16 QUEENS L.J. 287, 290 (1991).

84. See Brown, *supra* note 3, at 426 n.269 (explaining that same-sex relationships are at a disadvantage when courts attempt to protect children from extramarital sex because of the fact that same-sex partners are not permitted to marry). Cf. Burns v. Burns, 560 S.E.2d 47, 48 (Ga. Ct. App. 2002) (visitation consent order provided "no visitation nor residence by the children with either party during any time where such party cohabits with or has overnight stays with any adult to which such party is not legally married"). The mother failed to satisfy this condition by entering into a Vermont civil union with her female partner. *Id.* at 602

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standard, one wonders why Mr. Duncan includes it on his “continuum.” A possible answer emerges as he moves on to discuss the next point on the continuum, “bias provision as constitutional standard.”⁸⁵ I have argued in earlier work that Canon 3 might supplement or illuminate rational basis review of classifications based on sexual orientation.⁸⁶ Such an approach, Mr. Duncan writes, falls “even further from the traditional understanding of the reach of bias provisions”⁸⁷ than “preference for homosexual litigants.” “Preference for homosexual litigants” thus appears on Mr. Duncan’s continuum as a kind of rhetorical marker.⁸⁸ It seems clearly wrong to suggest that we can remedy bias in the courts by displacing preferences for heterosexual litigants with preferences for LGBT litigants. Such a position would advocate a new form of bias on the basis of sexual orientation—one that admittedly promotes rather than suppresses the interests of LGBT litigants, but nonetheless would inject a new form of bias into proceedings.

But treating Canon 3 as a supplement to constitutional protections for LGBT litigants does not lie beyond this rhetorical marker; it is wholly consistent with traditional notions of judicial neutrality. In *Romer v. Evans*,⁸⁹ the U.S. Supreme Court held that governments must show that classifications based on sexual orientation are rationally—empirically—related to legitimate purposes (purposes that cannot be driven by bare hostility toward homosexuality per se).⁹⁰ *Romer* gives reason to hope that classifications based on sexual orientation may start to receive more than “rubber-stamp review.”⁹¹ But even if *Romer* does not consistently receive the robust reading set forth above, Canon 3’s prohibition of normative bias might address some of the discrimination that would fall between the constitutional cracks. As I have argued in earlier work, “Canon 3 might offer a non-constitutional constraint that would more rigorously prevent judges from ruling against gay and lesbian litigants on the basis of distaste

85. Duncan, *supra* note 4, at 93.

86. See Brown, *supra* note 3, at 436-40.

87. Duncan, *supra* note 4, at 93.

88. “If you think preference for homosexual litigants is zany,” he seems to say, “just get a load of this constitutional stuff!” Of course Mr. Duncan is too dignified a scholar (and too nice a guy) to put the argument in quite these terms. See *id.* at 92-93.

89. 517 U.S. 620 (1996).

90. See *id.* at 632-33 (“[W]e insist on knowing the relation between the classification adopted and the object to be attained . . . [to ensure that] classifications are not drawn for the purpose of disadvantaging the group burdened by the law.”).

91. See Brown, *supra* note 3, at 437 (proclaiming that Canon 3 will establish greater scrutiny during appeals).

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for or moral condemnation of homosexuality per se.”⁹² To claim that a personal characteristic enumerated in Canon 3 is morally inferior seems a straightforward example of “bias” or “prejudice” forbidden by Canon 3. Thus, “Canon 3 might supplement *Romer* by eliminating a broader range of normative rationales for anti-gay rulings.”⁹³

CONCLUSION

In conclusion, I’ll suggest another way in which Canon 3 might supplement constitutional protections for LGBT litigants: flexible penalties. In an earlier work, I argued that discipline under Canon 3 could fill in when biased judges escape or grow inured to reversal on appeal.⁹⁴ This suggests that Canon 3 could increase the sting of penalties inflicted on biased judges. It is also possible, however, that Canon 3 could provide a more incremental, progressive mechanism for dealing with judicial bias. Rather than relying exclusively upon reversal to maintain the quality of judicial decision making, discipline under Canon 3 would permit a broader array of remedies. For mild or first-time manifestations of bias, judicial inquiry boards might simply issue a private reprimand, letting biased judges know that their peers do not approve of their actions. For more egregious examples of bias or for repeat offenders, public censure might be necessary to restore the public’s confidence in the neutrality of the bench. Finally, disqualification, suspension, and even impeachment could be deployed in the most serious cases, when judicial inquiry boards need to temporarily or permanently incapacitate biased judges. The graduated nature of the penalties available through disciplinary proceedings suggests that discipline need not be an “all or nothing” proposition; it can guide judges toward greater neutrality in their decision-making without publicly shaming them in all cases.⁹⁵

In the long run, the best way to curb judicial bias on the basis of sexual orientation is through education and dialogue. But some judges may need to know that penalties can escalate if private discussions and reprimands go unheeded. The range of remedies available through Canon 3 and the disciplinary proceedings it

92. *Id.* at 436-37.

93. *Id.* at 437.

94. *See id.* at 441-44 (recognizing that the appellate process will not be a complete check on orientation bias; a judge’s disrespect to the litigant and the system may require disciplinary action).

95. Similarly, John Braithwaite proposes a response to offenses that begins with dialogue and collaboration, and if necessary escalates to deterrence and incapacitation. *See generally* JOHN BRAITHWAITE, RESTORATIVE JUSTICE AND RESPONSIVE REGULATION 65 (2002).

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triggers allow this more nuanced response to judicial bias on the basis of sexual orientation.